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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1985

SHARON STEEL CORPORATION,
Appellant,

v.

THE CITY OF FAIRMONT, WEST VIRGINIA, EDWIN C. DALEY, City Manager of Fairmont, West Virginia, and GEORGE R. HIGINBOTHAM, City Attorney of Fairmont, West Virginia,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C.A. § 6901 *et seq.*, preempt a municipal ordinance which prohibits all disposal of hazardous waste pursuant to a federal hazardous waste permit, declares establishment of a federally permitted site to be a nuisance, and makes such disposal a criminal offense?

2. Does Section 6929 or Section 6972(f) of RCRA allow a political subdivision of a state to legislatively prohibit all disposal of hazardous waste within its borders?

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The opinion of the Supreme Court of Appeals of West Virginia, from which this appeal is taken, is reported at 22 ENV'T REP. (BNA) 1983 (1985) and is set out in Appendix A hereto. The opinion and order of the Circuit Court of Marion County, West Virginia are not reported but are set out in Appendices C and D hereto.

STATEMENT OF JURISDICTION

On July 5, 1983, appellant Sharon Steel Corporation (Sharon) filed a declaratory judgment action against the City of Fairmont, West Virginia (Fairmont or the City) seeking a declaration that Fairmont Ordinance No. 597 (the Ordinance) is preempted by the federal Resource Conservation and Recovery Act, as amended (RCRA), 42 U.S.C.A. § 6901 *et seq.* (West Supp. 1985). By opinion dated February 22, 1984 and order dated April 13, 1984, the Circuit Court of Marion County, West Virginia rejected Sharon's challenge and ruled that the Ordinance is valid. The Circuit Court held that "[b]oth case law and the specific language of [RCRA] indicate that the [Ordinance] and other similar state and local laws are not meant to be preempted . . .." (App. C, 26a-27a; App. D, 30a.) By opinion dated June 3, 1985, the Supreme Court of Appeals of West Virginia affirmed, holding that RCRA "do[es] not conflict with and therefore do[es] not preempt" the Ordinance. (App. A, 12a.) Appellant's timely petition for rehearing, dated June 27, 1985, was denied on July 10, 1985. (App. B, 24a-25a.) Notice of appeal to this Court was timely filed with the Supreme Court of Appeals of West Virginia and with the Circuit Court of Marion County, West Virginia on October 2, 1985. (App. E, 32a-35a.)

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2). Local ordinances are treated in the same manner as state statutes for jurisdictional purposes. *See, e.g., Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371, 2374 n.1 (1985); *City of New Orleans v. Dukes*, 427 U.S. 297, 301 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 n.2 (1975); *City of Chicago v. Atchison, T.&S.F.R.Co.*, 357 U.S. 77, 82 (1958).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article 6, clause 2 of the United States Constitution, states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C.A. § 6929 provides:

> Upon the effective date of regulations under this [Hazardous Waste Management] subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subchapter is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. Nothing in this chapter shall be

construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.

42 U.S.C.A. § 6972(f) provides:

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator [of the Environmental Protection Agency] or a State agency).

42 U.S.C.A. § 6903 provides in part:

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

* * *

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Fairmont Ordinance No. 597 is set out in full in Appendix G hereto. Sections 2, 3 and 4 of said Ordinance provide:

> Section 2. *Prohibition:* It shall be unlawful for any person to permanently dispose or attempt to permanently dispose of hazardous waste within the City. Provided, however, that storage of hazardous wastes by duly licensed and taxpaying enterprises shall not be prohibited.
>
> Section 3. *Nuisance:* In the event any person shall dispose or establish a site for the permanent disposal of hazardous waste in violation of the provisions of this Ordinance, the City Attorney is authorized, upon instructions from the City Manager, in addition to other penalties set forth herein, to institute any appropriate civil action or proceedings to prevent such disposal of hazardous waste, the same being deemed a public nuisance.
>
> Section 4. *Penalties:* Any person who shall violate a provision of this Ordinance or fail to comply with any of the requirements hereof shall be guilty of a misdemeanor, punishable by a fine of not more than Five Hundred Dollars, or by imprisonment not exceeding thirty days, or both fine and imprisonment. Each day that a violation continues or has not been totally abated shall be deemed a separate offense.

Section 1 of the Ordinance provides in part:

> Section 1. *Definitions:* 'Permanent Disposal' or 'Permanently Dispose' means the discharge, deposit, injection, dumping, spilling, leaking or placement of any hazardous waste into, on, above, or below any land or water which waste is to remain or which has remained at a disposal site within the City for a continuous period of five years and which is not intended to be removed from such site.

'Hazardous Waste' means a waste or combination of wastes, which because of its quantity, concentration or physical, chemical or infectious characteristics, may cause, or significantly contribute to an increase in mortality, or an increase in serious irreversible, or incapacitating reversible illness, or pose a substantial present or potential hazard to human health or the environment when stored. Provided, however, that hazardous wastes shall include only those whose disposal would require a state or federal hazardous waste permit.

STATEMENT OF THE CASE

From 1948 until 1979, Sharon operated a coke plant in Fairmont. During its operation, the plant generated and retained on-site waste which was later designated "hazardous waste" by regulations promulgated by the federal Environmental Protection Agency (EPA) pursuant to RCRA. In 1979, Sharon ceased operations at its Fairmont plant and, in accordance with the RCRA regulations, applied for permits to dispose of the previously retained wastes in a permanent hazardous waste containment facility to be constructed on-site. In 1983, while proceedings on Sharon's permit applications were continuing, the City enacted the Ordinance here challenged, making any permanent disposal of hazardous waste within the City unlawful and declaring the establishment of any site for such disposal to be a nuisance. The Ordinance was intended to prohibit Sharon's construction of its proposed facility when its federal hazardous waste disposal permit is issued.[1] Accordingly, Sharon brought its declaratory judgment action.

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1. In its complaint in the trial court, Sharon alleged as follows:

> 20. Sharon is informed and believes, and based upon such information and belief alleges, that the City intends that its planned construction of a permanent waste disposal facility on [its former plant site] is prohibited by the Ordinance.
>
> * * *
>
> 22. Sharon is informed and believes, and based upon such information and belief alleges, that the City intends to prosecute it for constructing or attempting to construct a permanent waste disposal facility on [its former plant site].

In its answer to Sharon's complaint, the City pleaded that:

> 1. The allegations of paragraphs . . . 20 [and] 22 [of Sharon's complaint] are admitted.

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

I. The First Question Presented Is Important And Substantial Because The Ordinance, If Allowed To Stand, Will Thwart Congress' Comprehensive National Plan For Managing Hazardous Waste; Will Directly Conflict With The National Permit Program Under RCRA; And Will Promote The Proliferation Of Local Vetoes Of Federal Hazardous Waste Facility Permitting Decisions.

Can the political subdivisions of the states, consistent with RCRA, absolutely prohibit the construction and operation of federally-permitted hazardous waste disposal facilities within their borders? It is Sharon's contention that they cannot—that such prohibitions "stand . . . as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" embodied in RCRA and are therefore preempted. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 160-68 (1978).[2]

A. CONGRESS' PURPOSE IN ENACTING RCRA WAS TO PROMOTE COMPREHENSIVE, NATIONALLY UNIFORM, REGULATION OF HAZARDOUS WASTE AS PART OF A COORDINATED RESPONSE TO THE PROBLEMS OF ENVIRONMENTAL POLLUTION.

In enacting RCRA, Congress found that the problems of hazardous waste disposal "have become a matter national in scope and in concern . . . necessitat[ing] Federal action." 42 U.S.C.A. § 6901(a)(4). In order "to provide nationwide protection against the dangers of improper hazardous waste disposal," H.R. REP. No. 1491,

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2. For purposes of preemption analysis, the constitutionality of a local ordinance is analyzed in the same way as a state law. *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371, 2375 (1985).

94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6238, 6249, Congress established in RCRA a national framework for the comprehensive regulation of every aspect of hazardous waste from "cradle to grave". *See* 1976 U.S. CODE CONG. & AD. NEWS at 6242, 6254, 6261.

In pursuit of its goals, Congress directed that the administrator of the EPA (the Administrator), after consultation with appropriate federal and state agencies, develop and promulgate criteria identifying the characteristics of hazardous wastes and listing specific hazardous wastes, 42 U.S.C.A. § 6921(a), and then promulgate minimum standards applicable to persons generating, 42 U.S.C.A. § 6922, transporting, 42 U.S.C.A. § 6923, or owning or operating facilities for the treatment, storage or disposal, 42 U.S.C.A. § 6924, of such wastes.

The Administrator has promulgated extensive regulations to implement the RCRA program. *See* 40 C.F.R. Parts 260-271 (1984).

Congress provided that the states, at their option, could develop, implement and enforce their own hazardous waste programs in lieu of the federal program, provided such state programs contained regulations at least as stringent as those imposed by the federal program. 42 U.S.C.A. §§ 6926(b), 6929. The guiding principle was that such programs must be "equivalent to" and "consistent with" the federal program and state programs applicable in other states and provide for "adequate enforcement of compliance with the requirements" of RCRA respecting hazardous waste disposal. 42 U.S.C.A. § 6926(b).

The legislative history recites the following with respect to this structure of RCRA:

> The general purpose of having federal minimum standards for hazardous waste disposal, with the op-

> tion of state implementation of state programs equivalent to the federal program, is (1) it provides uniformity among the states as to how hazardous wastes are regulated, (2) it provides industry and commercial establishments that generate such wastes uniformity among states, (3) by providing such uniformity a state with environmentally sound laws does not drive business out of the state to a state which, for economic reasons, decides to be a dumping ground for hazardous wastes, and (4) by permitting states to develop and implement hazardous waste programs equivalent to the federal program, the police power of the states are utilized rather than the creation of another federal bureaucracy to implement this act.

1976 U.S. CODE CONG. & AD. NEWS at 6268.

Congress provided that RCRA would be enforced in a variety of ways: through inspections by authorized inspectors, 42 U.S.C.A. § 6927(a), through compliance orders issued by the Administrator and enforced in court, 42 U.S.C.A. § 6928(a)(1), and/or through imposition of civil, 42 U.S.C.A. § 6928(a)(3), or criminal, 42 U.S.C.A. § 6928(d), penalties. In addition, Congress provided that RCRA standards and requirements could be enforced in citizens' suits. 42 U.S.C.A. § 6972(a).

Above all, Congress intended that RCRA be an integral part of a coordinated national response to the national problem of environmental pollution. *See, e.g.*, the Clean Air Act, as amended, 42 U.S.C.A. § 7401 *et seq.* (West Supp. 1985); the Clean Water Act, as amended, 33 U.S.C.A. § 1251 *et seq.* (West Supp. 1985); and the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C.A. § 9601 *et seq.* (West Supp. 1985). As the report of the House of Representatives Committee which favorably recommended RCRA for passage states:

> The Committee believes that the approach taken by this legislation eliminates the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes. Further, the Committee believes that this legislation is necessary if other environmental laws are to be both cost and environmentally effective. At present the federal government is spending billions of dollars to remove polluta[nt]s from the air and water, only to dispose of such pollutants on the land in an environmentally unsound manner. The existing methods of land disposal often result in air pollution, subsurface leachate and surface run-off, which affect air and water quality. This legislation will eliminate this problem and permit the environmental laws to function in a coordinated and effective way.

1976 U.S. CODE CONG. & AD. NEWS at 6241-6242.

B. THE ORDINANCE IS IN DIRECT CONFLICT WITH RCRA BECAUSE IT PROHIBITS AND DECLARES TO BE A NUISANCE THAT, AND PRECISELY AND ONLY THAT, WHICH RCRA PERMITS.

Congress provided in RCRA that each person who would own or operate a facility for the treatment, storage or disposal of hazardous wastes must first obtain a permit from the Administrator to conduct such activities. The disposal of any hazardous waste, except in accordance with the provisions of such a federal hazardous waste disposal permit, is prohibited. 42 U.S.C.A. § 6925(a).[3]

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3. A permit issued by a state agency pursuant to a fully approved state hazardous waste program has the same effect as a federal permit issued pursuant to 42 U.S.C.A. § 6925(a). 42 U.S.C.A. § 6926(d). West Virginia does not yet have a fully approved state hazardous waste program.

The Ordinance prohibits the permanent disposal of, and declares to be a nuisance the establishment of any site for the permanent disposal of, hazardous waste within the City's boundaries. Ordinance §§ 2, 3. The Ordinance defines the terms "permanent disposal" and "hazardous waste" in virtually the same words as RCRA. *Cf.* Ordinance § 1 and 42 U.S.C.A. §§ 6903(3), 6903(5). Significantly, the Ordinance adds a proviso to the definition of "hazardous waste" which provides that the term as used in the Ordinance "shall include only those [wastes the permanent disposal of which] would require a state or federal hazardous waste permit."

Thus, the Ordinance prohibits and declares to be a nuisance that—and precisely and only that—which the federal government permits under RCRA. It is difficult to imagine a more direct conflict between a local enactment and federal law.

C. THE ORDINANCE IS DIRECTLY CONTRARY TO THE NATIONAL POLICY ON THE ROLE OF LOCAL POLITICAL SUBDIVISIONS WITHIN THE RCRA REGULATORY PROGRAM.

In order to obtain a hazardous waste disposal permit, Congress provided that an applicant must make a detailed showing that his proposed facility will comply in all respects with the Administrator's standards promulgated under RCRA. 42 U.S.C.A. § 6925(c). If a proposed facility does so comply, the Administrator is obligated to issue the required permit. 42 U.S.C.A. § 6925(c).

Congress recognized, however, that, since a hazardous waste disposal permit is site-specific, local governmental units would have legitimate interests in any decision the Administrator would make. It required, therefore, that, prior to the time the Administrator may issue any permit, he must provide notice to "each unit of local government having jurisdiction over the area in which such facility is proposed to be located and to each

State agency having any authority under State law with respect to the construction or operation of such facility" of his intent to issue such permit. 42 U.S.C.A. § 6974(b). If he receives notice of opposition to his intent, he is required to hold a public hearing at which oral and written testimony must be received. *Id.* Only after the hearing contemplated by this Section can the Administrator issue any permit. *Id.* There is no question, however, that Congress intended the ultimate permitting decision to be the Administrator's.

Fairmont's Ordinance is directly contrary to the congressional policy embodied in these provisions of RCRA. Where Congress provided that local governments would be participants in a decision-making process, Fairmont would short-circuit the process through the imposition of a blanket local siting ban. Where Congress provided that the Administrator would be the ultimate decision-maker, Fairmont would unilaterally veto any decision he might make. Fairmont would turn Congress' plan upside down. The tail would wag the dog. It is difficult to imagine an enactment more contrary to a congressional scheme.

D. LOCAL PROHIBITIONS, SUCH AS THIS ORDINANCE, POSE A REAL AND SUBSTANTIAL THREAT TO CONGRESS' GOALS IN RCRA AND OTHER FEDERAL POLLUTION CONTROL LEGISLATION.

The issue presented in this case is not new. In 1979, EPA considered local disposal bans in the context of attempts by local governments to prohibit the disposal within their borders of polychlorinated biphenyls (PCBs), a hazardous substance disposal of which is regulated under the federal Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* (TSCA). In words equally applicable to RCRA, EPA responded to these attempts as follows:

> . . . EPA has become concerned that actions by local and State governments to prohibit disposal of PCBs and other substances in their jurisdictions could

> frustrate the national goal of properly disposing of hazardous chemical substances. While EPA has always believed that States should have the right to set pollution control standards more restrictive than the Federal standards, it would be a matter of national concern if this principle were to become the basis for refusal by States to share in the national responsibility for finding safe means for the proper disposal of hazardous substances.

44 Fed. Reg. 31528 (1979).

State and federal courts have also considered the issue presented in this case. Until now, each has recognized the real and substantial threat presented by local enactments such as Fairmont's to federal pollution control efforts.

In *Rollins Environmental Services, Inc. v. Iberville Parish Police Jury*, 371 So.2d 1127, 1132 (La. 1979), a RCRA case, the Supreme Court of Louisiana struck down an ordinance prohibiting the disposal of hazardous waste within the boundaries of a political subdivision of that state on the grounds that it was "not difficult to conclude that if [the subdivision] is permitted to prohibit the disposal of industrial hazardous waste within its borders, there will be, in short order, similar ordinances in every [subdivision] of the State."

Similarly, in *Warren County v. North Carolina*, 528 F. Supp. 276, 289-90 (E.D. N.C. 1981), a TSCA case, a federal district court struck down a local ordinance prohibiting the disposal of PCBs within the local government's boundaries, reasoning:

> Were the Court to approve this ordinance, no doubt the other ninety-nine counties in North Carolina would quickly enact identical bans. What, then, would North Carolina do with the PCB laced soil? Surely our neighbors in Virginia and Tennessee,

> South Carolina and Georgia would also object to our carrying such wastes into their states. The [challenged] ordinance clearly stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the Toxic Substances Control Act and, therefore, is void.

The decision of the Supreme Court of Appeals of West Virginia in the instant case thus stands in stark contrast to previous decisional law in the area of hazardous waste disposal. Moreover, the decision, if allowed to stand, legitimizes local resistance to Congress' carefully-crafted anti-pollution control efforts. If Fairmont's Ordinance is valid, other political subdivisions in West Virginia, and in other states, will inevitably follow suit with devastating effects on Congress' attempts to address the serious problems of environmental pollution in a coordinated, uniform manner.

The dangers inherent in this decision extend beyond RCRA. For example, in December 1980 Congress passed the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), 42 U.S.C.A. § 9601 *et seq.* (West Supp. 1985), to address the problems caused by releases into the environment of hazardous substances from waste sites that were closed or abandoned prior to the effective date of the RCRA regulations. CERCLA gives the Administrator a variety of tools to prevent and remedy such releases: he may clean up a site and recover the cost of so doing from the persons responsible, 42 U.S.C.A. § 9607(c)(3); he may use the Hazardous Substance Response Fund (Superfund) to finance the cleanup, 42 U.S.C.A. §§ 9604(c), 9611; or he may compel those responsible for the release to clean up the site, 42 U.S.C.A. §§ 9604, 9606(a). Where are these hazardous substances to be taken once they are captured? Some may be detoxified, but, until now, most have been taken to sites with federal hazardous

waste disposal permits or having the status of sites with such permits. Thus, the CERCLA program, too, is threatened by the decision of the Court below in the instant case: Congress' efforts embodied in CERCLA directed at remedying past environmental pollution can be brought to a halt if localities in which hazardous waste disposal sites are located can follow Fairmont's lead of prohibiting such disposal and making such disposal a crime.[4]

It is difficult to imagine a more obvious obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

II. The Second Question Presented Is Important And Substantial Because The Provisions Of RCRA Preserving Certain Rights For Citizens And States Cannot Be Interpreted To Allow Exceptions To Swallow The Rule By Sanctioning Local Prohibitions Of Federally Permitted Hazardous Waste Facilities.

A. SECTION 6972(f) OF RCRA PERTAINS TO CITIZENS' SUITS AND HAS NO RELEVANCE TO A DETERMINATION OF THE LEGALITY OF THE ORDINANCE.

The Court below held that, since RCRA contains a provision, 42 U.S.C.A. § 6972 (f), "preserving common law actions, including nuisance actions, an ordinance

4. The decision in the instant case might also have implications in the area of nuclear waste disposal. *See, e.g., Jersey Central Power & Light Co. v. Township of Lacey,* Nos. 84-5652 and 84-5763 (3d Cir. September 6, 1985), where a local ordinance prohibited the importation and storage of nuclear wastes. The Third Circuit held such an ordinance to be preempted by the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011-2296 (1982), and the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1812 (1982) (HMTA). With respect to the latter, the court held that the ordinance was not "consistent" with federal pollution control efforts as embodied in the HMTA.

passed by a municipality declaring the permanent disposal of hazardous wastes as therein defined to be a public nuisance is not pre-empted . . . ." (App. A, 1a, syllabus point 1.)[5]

Section 6972 of RCRA is captioned "Citizens suits". Subsection (a) of the Section provides that, subject to certain requirements set forth therein, any person may commence a civil action on his own behalf—

> (1) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or
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5. As described elsewhere herein (*see, e.g.*, pp. 6, 10), the Ordinance here challenged declares the establishment of any site for the permanent disposal of hazardous waste to be a nuisance. Ordinance § 3. Independent of this Section, the Ordinance also prohibits all disposal of hazardous waste within the City without reference to principles of nuisance law. Ordinance § 2. The Ordinance also provides for criminal penalties for violations of either Section 2 or 3. Ordinance § 4. The Court below never addressed these latter two Sections of the Ordinance. More basically, although four of six syllabus points in the lower Court's opinion mention the word "nuisance", the issue before this Court in fact has nothing to do with nuisance. The issue presented here is the legal power of a municipality to pass an ordinance prohibiting that and only that which federal law specifically authorizes pursuant to permits. It is of no moment whatsoever whether that ordinance is styled a prohibition, a regulation or a nuisance abatement. Our federal system would be fragile indeed if national policies could be thwarted merely by denominating offending local enactments as "nuisance abatement" enactments. Assuming *arguendo* that Fairmont's Ordinance is merely a nuisance ordinance, it still should be subjected to the same preemption analysis as applied to any other local enactment.

> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

42 U.S.C.A. § 6972 (a). Thus, Congress intended that Section 6972 provide another enforcement weapon (*i.e.*, citizens' suits) to aid in achieving compliance with the requirements of RCRA. Congress then added subsection (f) to make it clear that any person could also seek enforcement of solid or hazardous waste requirements under other statutes or common law:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency.)

42 U.S.C.A. § 6972(f).

Plainly, Fairmont's Ordinance is not a "citizens suit". Moreover, Section 6972(f) simply has no relevance to this case since the Ordinance is not directed at enforcing "any standard or requirement relating to the management of solid waste or hazardous waste".

In brief, rather than giving Section 6972 the role in the RCRA scheme Congress intended for it (*i.e.*, as an additional enforcement provision), the Court below held that it was intended to permit local governmental bodies to avoid involvement in RCRA. Its misreading of Section 6972 then caused the Court below to examine inapposite case law to determine the preemption issue. It cited cases for the proposition that nuisance actions may be brought despite the enactment of RCRA (App. A, 11a-15a), a proposition that at no time has been contested

by Sharon. The Court below apparently read Section 6972(f) to exempt "from the ambit of the federal act" any municipal enactment that could be construed to have nuisance abatement as its subject matter. (App. A, 15a). As set forth above, however, the context makes clear that the correct reading of that Section restricts its application to those municipal enactments that would further, and not frustrate, the standards and requirements of RCRA.

B. Section 6929 of RCRA cannot be read to authorize local governments to prohibit absolutely construction of hazardous waste facilities within their boundaries.

Significantly, in presenting its case below, the City of Fairmont never even cited Section 6972(f) relied on by the Court below to uphold the Ordinance. The City relied on Section 6929 of the Act—which the Court below never referred to in its opinion.

RCRA Section 6929 provides in pertinent part as follows:

> Upon the effective date of regulations under this [Hazardous Waste Management] subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations. . . . Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.

The Ordinance here challenged has nothing at all to do with "imposing requirements" respecting hazardous waste disposal. It is, instead, a blanket ban on all such disposal within a particular geographic area. Moreover,

as set forth above, Congress' scheme in RCRA was to provide for the promulgation by the federal government of minimum standards applicable to hazardous waste management practices, with an option in the states and their subdivisions to impose more stringent requirements which were "equivalent to" and "consistent with" the scheme of RCRA. A blanket local facilities siting ban is neither.

Congress could not possibly have intended to permit a local governmental body to exempt itself completely from RCRA through the insertion of this single Section. Yet a decision upholding the Fairmont Ordinance—on whatever ground—has precisely this effect.

CONCLUSION

For the reasons stated above, the questions presented in this matter are so substantial as to require plenary consideration by this Court, with briefs on the merits and oral argument, for their resolution. It is absolutely imperative that this Court assert its jurisdiction in this case and unequivocally assert that no local governmental unit can do what Fairmont has done, *i.e.*, absolutely prohibit the disposal of hazardous wastes pursuant to a federal hazardous waste disposal permit. Failure to do so is to invite disaster on federal pollution control efforts such as those embodied in RCRA.

Respectfully submitted,

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APPENDIX A

OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 16349

SHARON STEEL CORPORATION

v.

CITY OF FAIRMONT, ET AL.

Marion County — Affirmed

MILLER, *Justice*

1. Since both the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(f), and the West Virginia Hazardous Waste Management Act, W. Va. Code, 20-5E-18(d) and -18(h), have provisions preserving common law actions, including nuisance actions, an ordinance passed by a municipality declaring the permanent disposal of hazardous wastes as therein defined to be a public nuisance is not pre-empted by the federal or State acts.

2. "'A municipal corporation has only the powers granted to it by the legislature, and any such power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable. If any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied.' Syllabus Point 2, *State ex rel. Charleston v. Hutchinson*, 154 W. Va. 585, 176 S.E.2d 691 (1970)." Syllabus Point 1, *City of Fairmont v. Investors Syndicate of America, Inc.*, ___ W. Va. ___, 307 S.E.2d 467 (1983).

3. A municipality has the authority to declare the improper permanent disposal of hazardous wastes a public nuisance under W. Va. Code, 8-12-5(23), which empowers municipalities "[t]o provide for the elimination of hazards to public health and safety," where the term

"hazardous waste" in the ordinance is defined, in part, as material which poses a substantial present or potential hazard to human health or the environment.

4. "Under the provision of the charter of the city of Fairmont, same as Code 1906, ch. 47, sec. 28 [now W. Va. Code, 8-12-5(23)], that 'the council shall have power to abate or cause to be abated anything which, in the opinion of a majority of the whole council, shall be a nuisance,' the council may abate only that as a nuisance which is recognized as such *per se*, or branded as such by lawful statute or ordinance." Syllabus Point 1, *Parker v. City of Fairmont*, 72 W. Va. 688, 79 S.E. 660 (1913).

5. "As a general rule, a fair test as to whether a particular use of real property constitutes a nuisance is the reasonableness or unreasonableness of the use of the property in relation to the particular locality involved, and ordinarily such a test to determine the existence of a nuisance raises a question of fact." Syllabus Point 3, *Sticklen v. Kittle*, __ W. Va. __, 287 S.E.2d 148 (1981).

6. "The legislature is vested with a wide discretion in determining what the public interest requires, the wisdom of which may not be inquired into by the courts; however, to satisfy the requirements of due process of law, legislative acts must bear a reasonable relationship to a proper legislative purpose and be neither arbitrary nor discriminatory." Syllabus Point 1, *State v. Wender*, 149 W. Va. 413, 141 S.E.2d 359 (1965), *overruled on other grounds, Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, __ W. Va. __, 328 S.E.2d 144 (1984).

MILLER, *Justice:*

Sharon Steel Corporation brought a declaratory action against the City of Fairmont challenging the legality of its Ordinance No. 597, which prohibits the permanent

disposal of hazardous wastes in the City as a public nuisance. The Circuit Court of Marion County upheld the ordinance. Sharon Steel argues that the ordinance should be invalidated for several reasons. First, because of the extensive federal and State regulation of hazardous wastes under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (RCRA)[1] and the West Virginia Hazardous Waste Management Act, W. Va. Code, 20-5E-1 through -23 (WVHWMA), the City is pre-empted from enacting local legislation on the subject. Second, the City lacks the authority to pass such an ordinance. Finally, the ordinance is in violation of substantive due process principles. We affirm the circuit court for the reasons hereinafter set out.

Sharon Steel operated a coking plant in the City of Fairmont from 1948 until 1979. During that time, the plant generated hazardous wastes as a by-product of its operations. After closing the coking plant, Sharon Steel sought to construct a permanent hazardous waste containment facility at the same location to dispose of the hazardous waste by-products that had accumulated. Sharon Steel has applied for the necessary federal and State permits for the construction of such a facility, but as of the time of this appeal, these permits have not yet been acquired or approved.

In June of 1983, Fairmont passed its Ordinance No. 597, which is the focal point of the controversy in this case.[2] The key portion of the ordinance is Section 2,

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1. The Solid Waste Disposal Act was amended in 1976 by the RCRA, which, among other changes, provided for hazardous waste management.

2. The full text of Ordinance No. 597 is:

"WHEREAS, West Virginia Code § 8-12-5 given plenary power and authority for municipalities to control and administer waterfronts and waterways;

which states the type of activity that Fairmont seeks to prohibit: "It shall be unlawful for any person to permanently dispose or attempt to permanently dispose of hazardous waste within the City. Provided, however, that storage of hazardous wastes by duly licensed and tax-paying enterprises shall not be prohibited." The term "storage" is defined in Section 1 to mean "local containment of hazardous wastes which wastes are not intended

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to prohibit the accumulation and require the disposal of garbage, refuse, waste, ashes, trash and other similar matters; to prevent injury or annoyance to the public or individuals from anything dangerous, offensive or unwholesome; to project and promote the public morals, safety, health, welfare and good order; to provide for the elimination of hazards to public health and safety and to abate or cause to be abated anything which in the opinion of a majority of the governing body is a public nuisance; and

"WHEREAS, The City Council finds that permanent disposal of hazardous wastes within the City is a nuisance in that it may depreciate property values; have an adverse impact on the City's ability to attract new business and industry and encourage expansion of existing business and industry; create a continuing serious anxiety and concern among city residents and visitors concerning the existence of a permanent hazardous waste disposal site within the city, all of which are offensive and constitute injury and annoyance to the public and individuals; and

"WHEREAS, the City Council finds that prohibition of the permanent disposal of hazardous waste will protect and promote the public morals, safety, health, welfare and good order in the City;

"NOW THEREFORE THE CITY OF FAIRMONT HEREBY ORDAINS THAT:

"SECTION 1. *Definitions:* 'Permanent Disposal' or 'Permanently Dispose' means the discharge, deposit, injection, dumping, spilling, leaking or placement of any hazardous waste into, on, above, or below any

to be permanently disposed of at any site within the City." Thus, Section 2 indicates that the ordinance allows the temporary storage of hazardous wastes by "duly licensed and taxpaying enterprises." It is only the permanent disposal of hazardous wastes that the ordinance seeks to prohibit.

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land or water which waste is to remain or which has remained at a disposal site within the City for a continuous period of five years and which is not intended to be removed from such site.

"'Hazardous Waste' means a waste or combination of wastes, which because of its quantity, concentration or physical, chemical or infectious characteristics, may cause, or significantly contribute to an increase in mortality, or an increase in serious irreversible, or incapacitating reversible illness, or pose a substantial present or potential hazard to human health or the environment when stored. Provided, however, that hazardous wastes shall include only those whose disposal would require a state or federal hazardous waste permit.

"'Person' means any individual, trust, firm, joint stock company, public or private or governmental corporation, partnership, association, state or federal agency.

"'Storage' means the otherwise local containment of hazardous wastes which wastes are not intended to be permanently disposed of at any site within the City.

"'Waste' means any garbage, refuse, sludge, and other discarded material including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial mining and agricultural operations, but does not include solid or dissolved material in domestic sewage.

"SECTION 2. *Prohibition:* It shall be unlawful for any person to permanently dispose or attempt to permanently dispose of hazardous waste within the City. Provided, however, that storage of hazardous wastes by duly licensed and taxpaying enterprises shall not be prohibited.

The term "waste" is defined in Section 1 to be "garbage, refuse, sludge, and other discarded material including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial mining and agricultural operations." The term "hazardous waste" parallels the definition of hazardous waste found in both the federal and State acts.[3] The only difference is that the ordinance definition does not adopt the ending phrase "when improperly treated, stored, transported" used in the federal and State acts, but simply concludes with the words "when stored."

The thrust of the ordinance is directed at prohibiting the permanent storage of hazardous wastes which are improperly stored in the sense that the wastes may "cause, or significantly contribute to an increase in mor-

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"SECTION 3. *Nuisance:* In the event any person shall dispose or establish a site for the permanent disposal of hazardous waste in violation of the provisions of this Ordinance, the City Attorney is authorized, upon instructions from the City Manager, in addition to other penalties set forth herein, to institute any appropriate civil action or proceedings to prevent such disposal of hazardous waste, the same being deemed a public nuisance.

"SECTION 4. *Penalties:* Any person who shall violate a provision of this Ordinance or fail to comply with any of the requirements hereof shall be guilty of a misdemeanor, punishable by a fine of not more than Five Hundred Dollars, or by imprisonment not exceeding thirty days, or both fine and imprisonment. Each day that a violation continues or has not been totally abated shall be deemed a separate offense.

"This Ordinance shall become effective not sooner than thirty (30) days after adoption."

3. The definition of "hazardous waste" found in W. Va. Code, 20-5E-3(6), is identical to that found in the RCRA, 42 U.S.C. 6903(5), and is as follows:

tality, or [serious] illness . . . or pose a substantial present or potential hazard to human health or the environment when stored." Ordinance No. 597, Sections 1 and 2.

The RCRA and the WVHWMA are primarily regulatory in nature and are designed to prevent improper treatment, storage, transportation, and disposal of hazardous wastes. They proceed on the theory that the technology exists to properly treat hazardous wastes so that they will not cause substantial harm to human health or the environment.

The City's ordinance is not regulatory. It is a penal ordinance directed at persons who improperly permanently store hazardous wastes which endanger human health or the environment. This conclusion is evident from the definitions in Section 1, the prohibition in Section 2, the nuisance provision in Section 3, and the penalty provision in Section 4. The net effect of the ordinance is to define a public nuisance condition involving hazardous wastes.

Through the enactment of this ordinance, the City is attempting to abate what it considers to be a public nuisance. *In Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 595-96, 34 S.E.2d 348, 354 (1945), we gave the following general definition of public nuisance:

"'Hazardous waste' means a waste or combination of wastes, which because of its quantity, concentration or physical, chemical or infectious characteristics, may (A) cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed."

> "A public nuisance is an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons. The distinction between a public nuisance and a private nuisance is that the former affects the general public, and the latter injures one person or a limited number of persons only. Ordinarily, a suit to abate a public nuisance cannot be maintained by an individual in his private capacity, as it is the duty of the proper public officials to vindicate the rights of the public."

See also W. Prosser and W. Keeton, The Law of Torts § 90 (5th ed. 1984); W. Rodgers, Jr., Handbook on Environmental Law § 2.2 (1977); Restatement (Second) of Torts § 821B (1979); 58 Am. Jur. 2d *Nuisances* § 7 (1971).

In *Martin v. Williams*, 141 W. Va. 595, 610-11, 93 S.E.2d 835, 844, 56 A.L.R.2d 756, 768 (1956), we generally described what may constitute a nuisance:

> "A nuisance is anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable .... A nuisance is anything which interferes with the rights of a citizen, either in person, property, the enjoyment of his property, or his comfort .... A condition is a nuisance when it clearly appears that enjoyment of property is materially lessened, and physical comfort of persons in their homes is materially interfered with thereby .... When the prosecution of a business, of itself lawful, in a strictly residential district, impairs the enjoyment of homes in the neighborhood, and infringes upon the well-being, comfort, repose, and enjoyment of the ordinary normal individual residing therein, the carrying on of such business in such locality becomes a nuisance, and may be enjoined." (Citations omitted).

As suggested by this broad definition, nuisance is a flexible area of the law that is adaptable to a wide variety of factual situations. We have decided nuisance cases involving land being used for rock concerts, *Berkeley County Comm'n v. Shiley*, __ W. Va. __, 295 S.E.2d 924 (1982), a school site near an airport, *Sticklen v. Kittle*, __W. Va. __, 287 S.E.2d 148 (1981), dust created by coal trucks, *West v. National Mines Corp.*, __ W. Va. __, 285 S.E.2d 670, 25 A.L.R.4th 1179 (1981), an automobile junk yard, *Mahoney v. Walter*, 157 W. Va. 882, 205 S.E.2d 692 (1974), a used car lot, *Martin v. Williams*, *supra*, a rail tramroad built on a public road, *Hark v. Mountain Fork Lumber Co.*, *supra*, a house of prostitution, *State v. Navy*, 123 W. Va. 722, 17 S.E.2d 626 (1941), an automobile garage built out of inflammable materials, *Harris v. Poulton*, 99 W. Va. 20, 127 S.E. 647, 40 A.L.R. 334 (1925), fences, *Donohoe v. Fredlock*, 72 W. Va. 712, 79 S.E. 736 (1913), coal smoke and soot emitted by a dye works plant, *Parker v. City of Fairmont*, 72 W. Va. 688, 79 S.E. 660 (1913), a carpenter shop with a steam engine, *Wood v. City of Hinton*, 47 W. Va. 645, 35 S.E. 824 (1900), damage to property adjacent to a railroad track, *Guinn v. Ohio River R.R. Co.*, 46 W. Va. 151, 33 S.E. 87 (1899), a merry-go-round, *Town of Davis v. Davis*, 40 W. Va. 464, 21 S.E. 906 (1895), an explosives factory, *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 21 S.E. 1035 (1895), a house built partially on city property, *Teass v. City of St. Albans*, 38 W. Va. 1, 17 S.E. 400 (1893), noise from a factory, *Powell v. Bentley & Gerwig Furniture Co.*, 34 W. Va. 804, 12 S.E. 1085 (1891), and an obstruction of a public road *Keystone Bridge Co. v. Summers*, 13 W. Va. 476 (1878).

Nuisance law has been particularly effective in addressing environmental problems. In W. Rodgers, Jr.,

Handbook on Environmental Law § 2.1 at 100 (1977), the following statement is made:

> "There is simply no common law doctrine that approaches nuisance in comprehensiveness or detail as a regulator of land use and of technological abuse. Nuisance actions have involved pollution of all physical media—air, water, land—by a wide variety of means .... Nuisance actions have challenged virtually every major industrial and municipal activity which is today the subject of comprehensive environmental regulation—the operation of land fills, incinerators, sewage treatment facilities, activities at chemical plants, aluminum, lead and copper smelters, oil refineries, pulp mills, rendering plants, quarries and mines, textile mills and a host of other manufacturing activities .... Nuisance theory and case law is the common law backbone of modern environmental and energy law."[4]

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4. A number of articles discuss the possible application of nuisance law to hazardous wastes and the problem of selecting appropriate sites for hazardous waste disposal facilities. *See, e.g.*, Duffy, *State Hazardous Waste Facility Siting: Easing the Process Through Local Cooperation and Preemption*, 11 B.C. Envtl. Aff. L. Rev. 755 (1984); Harrington, *The Right to a Decent Burial: Hazardous Waste and its Regulation in Wisconsin*, 66 Marq. L. Rev. 223 (1983); Tarlock, *Anywhere But Here: An Introduction to State Control of Hazardous-Waste Facility Location*, 14 Land Use & Env't L. Rev. 533 (1983); Trauberman, *Common Law Nuisance in Hazardous Waste Litigation: Has it Survived Milwaukee II?*, 13 Envtl. L. Rep. 10043 (1983); Comment, *Hazardous Waste Liability and Compensation: Old Solutions, New Solutions, No Solutions*, 14 Conn. L. Rev. 307 (1982); Comment, *Hazardous Waste Cleanup in Wyoming: Legal Tools Available to the Private Citizen*, 19 Land & Water L. Rev. 395 (1984); Comment, *Changes in the Ownership of Hazardous Waste Disposal Sites: Original and Suc-*

Having determined that the ordinance is directed at abating a public nuisance condition, rather than a regulatory ordinance designed to deal with the management and control over the disposal of hazardous wastes, we will now address the specific objections made by Sharon Steel against the ordinance's validity.

I.

An assertion of federal pre-emption is a claim easily made but difficult to apply in a given case because of the enormous variety of legislative overlap that occurs between federal, state, and local enactments.[5] In this case,

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cessor Liability, 67 Marq. L. Rev. 691 (1984); Comment, *Remedies for Hazardous Waste Injuries*, 11 N. Ky. L. Rev. 435 (1984); *Utah's Hazardous Waste Facility Siting Act: Burying Private and Local Interests to Facilitate Siting?*, 1983 Utah L. Rev. 327. For an example of a case where an action based on nuisance was successfully prosecuted against an operator of a hazardous waste facility, see *Village of Wilsonville v. SCA Services, Inc.*, 86 Ill. 2d 1, 55 Ill. Dec. 499, 426 N.E.2d 824 (1981).

5. In *Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Marketing & Bargaining Bd.*, — U.S. —, —, 81 L. Ed. 2d 399, 406, 104 S. Ct. 2518, 2523 (1984), this summary of federal pre-emption principles is made:

> "Federal law may pre-empt state law in any of three ways. First, in enacting the federal law, Congress may explicitly define the extent to which it intends to pre-empt state law .... Second, even in the absence of express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government .... Finally, if Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises

Sharon Steel does not argue that the federal RCRA pre-empts our WVHWMA.[6]

We decline to make any detailed discussion of the federal pre-emption doctrine in this case because we find that both the RCRA and our WVHWMA do not conflict with and therefore do not pre-empt the City's ordinance. Both acts have similarly worded savings clauses, 42 U.S.C. 6972(f),[7] and W. Va. Code, 20-5E-18(d), which state that nothing in the acts shall restrict any right any person may have under any statute or common law to seek enforcement of any standard or requirement relating to hazardous wastes or to seek any other relief. Fur-

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when compliance with both state and federal law is impossible . . . or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (Citations omitted).

6. Under 42 U.S.C. § 6926, states are permitted to adopt a hazardous waste program which, when it meets the federal standards, operates in lieu of the RCRA. In *Stablex Corp. v. Town of Hooksett*, 122 N.H. 1091, 1096-97, 456 A.2d 94, 97 (1982), the court recognized this fact and quoted from House committee reports indicating that the congressional intent was to permit a state to take over the hazardous waste program:

"For example, a House committee report on the RCRA states:

> 'It is the Committee's intention that the States are to have primary enforcement authority and if at anytime a State wishes to take over the hazardous waste program it is permitted to do so, provided that the State laws meet the Federal minimum requirements for both administering and enforcing the law.'

H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. 24, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6238, 6262."

7. 42 U.S.C. § 6972(f) provides:

"Nothing in this section shall restrict any right which any person (or class of persons) may have

thermore, W. Va. Code, 20-5E-18(h),[8] preserves the right of any person to bring an action based on nuisance.

These provisions indicate that Congress and our State legislature intended to preserve the rights of any person to file an action relating to hazardous wastes based on either statutory or common law grounds. The United States Supreme Court, in interpreting similar savings clauses in other federal environmental acts, has held that such provisions do not preserve the right to bring an action based upon federal common law, but has indicated that actions based upon other statutes or state common law would be preserved. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 n.31, 69 L. Ed. 2d 435, 451 n.31, 101 S. Ct. 2615, 2626-27 n.31 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304, 327-29, 68 L. Ed. 2d 114, 132-34, 101 S. Ct. 1784, 1797-99 (1981).

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under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency)."

8. W. Va. Code, 20-5E-18(h), provides:

"Notwithstanding any provision of this article to the contrary, any person may maintain an action to enjoin a nuisance against any permit holder or other person subject to the provisions of this article and may seek damages in said action, all to the same extent and for all intents and purposes as if this article were not enacted if such person maintaining such action and seeking such damages would otherwise have standing to maintain such action and be entitled to damages by any other rule of law."

See also W. Va. Code, 20-5E-10 (Facilities in existence at the time WVHWMA became effective that would now be required to have a permit shall operate "in such a manner as will not cause or create a substantial risk of a health hazard or a public nuisance or a significant adverse effect upon the environment.").

We have found only a few cases addressing the issue of whether an action based upon a state's common law of nuisance can be maintained without being pre-empted by the RCRA. In *Environmental Defense Fund, Inc. v. Lamphier,* 714 F.2d 331, 337 (4th Cir. 1983), where State agencies and citizens sought to enjoin the continued operation of an industrial waste disposal facility on a nuisance theory, the Fourth Circuit held:

> "Under the citizen suit provision of RCRA, 42 U.S.C. § 6972, the district court is authorized to enforce RCRA regulations or orders, presumably to the full extent of its legal and equitable powers. 42 U.S.C. § 6972(a). Provided plaintiffs are genuinely acting as private attorneys general rather than pursuing a private remedy, nothing in RCRA . . . bars injunctive relief. *See* 42 U.S.C. § 6928." (Footnote omitted).[9]

The court also rejected the contention that the state's hazardous waste act had pre-empted an action based upon the state's common law of nuisance.

In *Neal v. Darby,* 282 S.C. 277, 318 S.E.2d 18 (S.C. App. 1984), the challenged chemical company conceded that neither the RCRA nor the state's hazardous waste management act pre-empted an action based on nuisance. *See also State v. Schenectady Chemicals, Inc.*, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (1984) (State common law nuisance action against chemical company responsible for disposing of chemical wastes held not pre-empted by federal environmental legislation); *State v. Monarch Chemicals, Inc.*, 90 A.D.2d 907, 456 N.Y.S.2d 867 (1982) (State common law nuisance action to abate soil and water contami-

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9. It should be noted that 42 U.S.C. § 6972(a) specifically enables citizens to seek enforcement of the RCRA after giving the government notice to first proceed to correct the condition.

nation held not pre-empted by federal legislation, including RCRA); *cf. Krueger v. Mitchell*, 112 Wis. 2d 88, 332 N.W.2d 733 (1983) (State common law nuisance action against noise created by airport held preserved by savings clause in federal legislation).

The present situation is somewhat analogous to *Exxon Corp. v. Eagerton*, 462 U.S. 176, 76 L. Ed. 2d 497, 103 S. Ct. 2296 (1983), where the United States Supreme Court addressed the question of whether the Natural Gas Pricing Act (NGPA) pre-empted an Alabama statute which prohibited oil and gas producers from passing on severance tax increases to their customers. The United States Supreme Court concluded that the NGPA pre-empted the pass-through provision on sales of gas in interstate commerce. However, after analyzing the NGPA and particularly Section 602(a), 15 U.S.C. § 3432(a), which allows states to set lower prices on intrastate sales below that set by the NGPA for interstate sales, the Supreme Court concluded:

> "We reach a different conclusion with respect to the application of the pass-through prohibition to sales of gas in intrastate commerce. Although § 105(a) of the NGPA extended federal authority to control prices to the intrastate market, 15 U.S.C. § 3315(a) (1976 ed., Supp. V), Congress also provided that this extension of federal authority did not deprive the States of the power to establish a price ceiling for intrastate producer sales of gas at a level lower than the federal ceilings." 462 U.S. at 186, 76 L. Ed. 2d at 507, 103 S. Ct. at 2303. (Footnote omitted).

See Pennzoil Co. v. Public Service Comm'n, ___ W. Va. ___, 327 S.E.2d 444 (1985).

The lesson of *Exxon* is that a federal statute will not be deemed to pre-empt a state or municipal enactment where the federal statute clearly exempts the subject matter of the state or municipal enactment from the ambit of the federal act. Here, the provisions in 42 U.S.C. § 6972(f) of the RCRA and W. Va. Code, 20-5E-18(d), of the WVHWMA preserve other statutory and State common law rights with regard to the management of hazardous wastes.

We are not persuaded by Sharon Steel's argument that we should follow the holdings of *Stablex Corp. v. Town of Hooksett*, 122 N.H. 1091, 456 A.2d 94 (1982), and *Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury*, 371 So.2d 1127 (La. 1979). In *Stablex*, the challenged ordinance required approval of the voters in the town before a hazardous waste facility could be established therein. The court found the ordinance to be pre-empted by the comprehensive statewide regulation of hazardous wastes. The ordinance in *Rollins* completely banned any hazardous waste facility within the parish and was held to be void because of the extensive federal and state regulation in the area of hazardous wastes.

These two cases are inapplicable because neither dealt with the authority of a municipality or parish to abate public nuisances, which is the focus of the present case. Furthermore, as the City points out, the Louisiana legislature amended its Hazardous Waste Management Act, La. Rev. Stat. Ann. § 30:1144(B), to, in effect, reverse the *Rollins* decision and allow parishes to pass ordinances banning or zoning out hazardous waste facilities. Here, the ordinance does not completely ban hazardous waste disposal facilities, but is directed at those that

pose a substantial danger to human health or the environment.

We, therefore, conclude that because both the RCRA and the WVHWMA have provisions preserving common law actions, including nuisance actions, an ordinance passed by a municipality declaring the permanent disposal of hazardous wastes as therein defined to be a public nuisance is not pre-empted by either the federal or State acts.

II.

Sharon Steel's argument that the City lacks the power to enact a hazardous waste ordinance rests upon our familiar law regarding the limited powers of municipalities recently set out in Syllabus Point 1 of *City of Fairmont v. Investors Syndicate of America, Inc.*, ___ W. Va. ___, 307 S.E.2d 467 (1983):

> " 'A municipal corporation has only the powers granted to it by the legislature, and any such power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable. If any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied.' Syllabus Point 2, *State ex rel. Charleston v. Hutchinson*, 154 W. Va. 585, 176 S.E.2d 691 (1970)."

See also Syllabus Point 2, *Hyre v. Brown*, 102 W. Va. 505, 135 S.E. 656, 49 A.L.R. 1230 (1926).

We again stress that the ordinance is not a regulatory enactment, but is instead a penal ordinance designed to codify the common law of nuisance. We agree with the City's assertion that a municipality has the authority to declare the improper permanent disposal of hazardous wastes a public nuisance under W. Va. Code, 8-12-5(23), which empowers municipalities "[t]o provide

for the elimination of hazards to public health and safety," where the term "hazardous waste" in the ordinance is defined, in part, as material which poses a substantial present or potential hazard to human health or the environment.[10] Additional powers which further support the City's authority to pass the ordinance can be found in the following subsections of W. Va. Code, 8-12-15: (10) (authorizing regulation of garbage, trash, wastes, and other similar matters); (13) (authorizing the prevention of anything that is dangerous, offensive, or unwholesome to the public); and (44) (authorizing the protection and promotion of public morals, safety, health, welfare, and good order).

Admittedly, none of these subsections specifically refer to hazardous wastes, but there is no question from our cases that we have always considered these provisions to be a sufficient grant of authority enabling municipalities to abate public nuisances. In *Parker v. City of Fairmont*, 72 W. Va. 688, 79 S.E. 660 (1913), we discussed an earlier counterpart to W. Va. Code, 8-12-5(23), and concluded in Syllabus Point 1:

> "Under the provision of the charter of the city of Fairmont, same as Code, ch. 47, sec. 28, that 'the council shall have power to abate or cause to be abated anything which, in the opinion of a majority of the whole council, shall be a nuisance,' the council may abate only that as a nuisance which is recognized as such *per se*, or branded as such by lawful statute or ordinance."

---

10. W. Va. Code, 8-12-5(23), states that a municipality is empowered "[t]o provide for the elimination of hazards to public health and safety and to abate or cause to be abated anything which in the opinion of a majority of the governing body is a public nuisance."

See also Syllabus Point 1, *Donohoe v. Fredlock*, 72 W. Va. 712, 79 S.E. 736 (1913); *Wood v. City of Hinton*, 47 W. Va. 645, 35 S.E. 824 (1900); *Town of Davis v. Davis*, 40 W. Va. 464, 21 S.E. 906 (1895).

It is generally recognized that even though a municipality has the power to enact an ordinance declaring some activity or thing to be a nuisance, such a declaration does not mean that the municipality is relieved of its burden to show that the activity or thing is in fact a nuisance when it seeks to enforce its ordinance. *See Yates v. City of Milwaukee*, 77 U.S. (10 Wall.) 497, 19 L. Ed. 984 (1870); *City of Russellville v. Vulcan Materials Co.*, 382 So.2d 525 (Ala. 1980); *City of Denver v. Mullen*, 7 Colo. 345, 3 P. 693 (1884); *Jewel Tea Co. v. Town of Bel Air*, 172 Md. 536, 192 A. 417 (1937); *Potashnick Truck Service, Inc. v. City of Sikeston*, 351 Mo. 505, 173 S.W.2d 96 (1943); *Painter v. Town of Forest Acres*, 231 S.C. 56, 97 S.E.2d 71 (1957); *City of Houston v. Lurie*, 148 Tex. 391, 224 S.W.2d 871, 14 A.L.R.2d 61 (1949); *Eno v. City of Burlington*, 125 Vt. 8, 209 A.2d 499 (1965); 6 E. McQuillin, The Law of Municipal Corporations § 24.83 (3d ed. 1980); 58 Am. Jur. 2d *Nuisances* § 172 (1971).

We have adopted a rather similar approach in the cases we have decided under the antecedent of W. Va. Code, 8-12-5(23). In *Teass v. City of St. Albans*, 38 W. Va. 1, 17 S.E. 400 (1893), we held that even though a municipality declares in an ordinance that something is a public nuisance, this does not give the municipality the authority to abate the nuisance without first prosecuting the matter in a court. In *Parker*, 72 W. Va. at 690-91, 79 S.E. at 661-62, we acknowledged that a municipality has the power to enact an ordinance declaring a matter a nuisance, but noted:

> "That provision can not rightly be construed to mean that the council may determine that to be a nuisance which is not such by the common law, by statute, or by ordinance. It gives power to abate nuisances, not to determine what shall be considered nuisances. It plainly relates to nuisances *per se*, those primarily branded as such by the law . . . . The charter provision grants a police power of abatement; not an arbitrary power of determining that something is a nuisance which by no law is known to be such. It is not reasonable to presume that the Legislature meant to grant such arbitrary power to the municipal authorities. True, the opinion of the majority of the whole council is called for by the provision. But that opinion is to be applied in discerning that the thing complained of comes within the category of nuisances pronounced to be such by law. Clearly the power granted is to abate what the law holds to be a nuisance, not to enact that any particular thing is a nuisance."

We have more recently held that whether some activity or thing is a nuisance is generally a question of fact, as stated in Syllabus Point 3 of *Sticklen v. Kittle*, ___ W. Va. ___, 287 S.E.2d 148 (1981):

> "As a general rule, a fair test as to whether a particular use of real property constitutes a nuisance is the reasonableness or unreasonableness of the use of the property in relation to the particular locality involved, and ordinarily such a test to determine the existence of a nuisance raises a question of fact."

See also Mahoney v. Walter, 157 W. Va. 882, 205 S.E.2d 692 (1974).

Therefore, we conclude that while the ordinance declares the permanent disposal of hazardous wastes, as

therein defined, within the City of Fairmont to be a public nuisance, the issue of whether a given site is a public nuisance is a question of fact dependent upon the circumstances existing at such site. We, however, affirm the power of the City to enact such an ordinance as we believe by its terms, under the definition of "hazardous waste," a common law nuisance is defined.

III.

The final argument presented is that the ordinance is so arbitrary and unreasonable that it violates substantive due process standards. The substantive due process standard that we apply to legislative enactments is summarized in Syllabus Point 1 of *State v. Wender*, 149 W. Va. 413, 141 S.E.2d 359 (1965), *overruled on other grounds, Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, ___ W. Va. ___, 328 S.E.2d 144 (1984):

> "The legislature is vested with a wide discretion in determining what the public interest requires, the wisdom of which may not be inquired into by the courts; however, to satisfy the requirements of due process of law, legislative acts must bear a reasonable relationship to a proper legislative purpose and be neither arbitrary nor discriminatory."

See also DeCoals, Inc. v. Board of Zoning Appeals, ___ W. Va. ___, 284 S.E.2d 856 (1981); *Thorne v. Roush*, ___ W. Va. ___, 261 S.E.2d 72 (1979); *O'Neil v. City of Parkersburg*, 160 W. Va. 694, 237 S.E.2d 504 (1977); *State ex rel. Harris v. Calendine*, 160 W. Va. 172, 233 S.E.2d 318 (1977). We noted in *Hartsock-Flesher Candy Co.* that substantive due process challenges to legislative enactments are not now generally favored.

Fairmont's City Council stated several reasons in the preamble of its ordinance for addressing the issue of hazardous waste disposal:

> "The City Council finds that permanent disposal of hazardous wastes within the City is a nuisance in that it may depreciate property values; have an adverse impact on the City's ability to attract new business and industry and encourage expansion of existing business and industry; create a continuing serious anxiety and concern among city residents and visitors concerning the existence of a permanent hazardous waste disposal site within the city, all of which are offensive and constitute injury and annoyance to the public and individuals."

As previously noted, the City has the authority under its police powers to protect the health and safety of its citizens as well as to ensure the economic integrity of the City. We find the City's exercise of its authority to abate public nuisances to be a responsible and reasonable approach to the problems potentially presented by permanent hazardous waste facilities which are substantially hazardous to the human health or the environment.

Sharon Steel argues that Section 2 of the ordinance makes an arbitrary and discriminatory distinction between permanent hazardous waste disposal and temporary hazardous waste storage. Additionally, Sharon Steel argues that the ordinance does not address the problems of hazardous waste transportation and generation within the City. We are not presented with a sufficiently developed record to determine if the distinction between permanent disposal and temporary storage of hazardous wastes is indeed arbitrary and discriminatory. We doubt whether this would raise a substantive due process issue because an action based on the common law of public

nuisance could also be brought against a person temporarily storing hazardous wastes. W. Va. Code, 20-5E-18(h). Consequently, we hold that the ordinance does not violate substantive due process.

For the foregoing reasons, we conclude that Fairmont's Ordinance No. 597 is valid and affirm the decision of the Circuit Court of Marion County.

Affirmed.

APPENDIX B

ORDER OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA WITH RESPECT TO PETITION FOR REHEARING

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 3rd day of June, 1985, the following order was made and entered, to-wit:

Sharon Steel Corporation, Plaintiff Below, Appellant

vs.

City of Fairmont, West Virginia, Edwin C. Daley, City Manager of Fairmont, West Virginia, and George R. Higinbotham, City Attorney of Fairmont, West Virginia, Defendants Below, Appellees

Upon an appeal from a judgment of the Circuit Court of Marion County rendered on the 13th day of April, 1984.

The Court having maturely considered the transcript of the record herein, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is no error in said judgment. It is therefore considered and ordered by the Court that the judgment of the Circuit Court of Marion County rendered on the 13th day of April, 1984, be, and the same is hereby, affirmed, and that the appellees do recover of and from the appellant their costs about their defense in this Court in this behalf expended, and Thirty Dollars damages; all of which is ordered to be certified to the Circuit Court of Marion County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Miller, was concurred in by Chief Justice Neely and Justices McGraw, McHugh and Brotherton. A True Copy

Attest:/s/ GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

APPENDIX C

OPINION OF THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

February 22, 1984

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Re: Sharon Steel Corporation v.
City of Fairmont, et al.
Civil Action No. 83-C-392

Gentlemen:

Regarding the motions pending in the above captioned civil action, I have reviewed the memoranda submitted by both parties, as well as my notes of the legal arguments advanced at the hearing on February 10, 1984.

It is my opinion that Fairmont City Ordinance 597 withstands the test of validity, and that the temporary injunctive relief against its enforcement, granted by the Supreme Court of Appeals of West Virginia, should be dissolved.

Specifically, my findings and rulings are as follows:

(1) Both case law and the specific language of the Federal Resource, Conservation, and Recovery

Act ("RCRA"), 42 U.S.C. §6901 *et seq.*, indicate that the Fairmont ordinance and other similar state and local laws are not meant to be pre-empted by the federal legislation.

(2) Ordinance 597 is not designed to regulate the disposal of hazardous waste. Rather, it was adopted to deal with a nuisance, and is within the purview of the plenary power granted municipalities by West Virginia Code §8-12-5.

(3) West Virginia Code §20-5E-1, *et seq.*, ("HWMA") does not restrict the rights of municipalities to deal with what they deem to be "nuisances."

(4) Ordinance 597 is neither arbitrary nor unreasonable, under the circumstances; indeed, it bears a real and substantial relation to the public health, safety and general welfare.

I am somewhat troubled by the holdings in the cases of *Environmental Services v. Iberville*, 371 So.2d 1127 (La. 1979) and *Stablex Corp. v. Town of Hooksett*, 122 N.H. 1091, 456 A.2d 94 (1982), which are state court cases pretty much in point with the instant case. They are, however, distinguishable. The *Environmental Services* case involved a "parish" (the equivalent of our "county") ordinance, and holds that the end result might be similar actions by all parishes which would severely stifle the affected industry throughout the state. I believe the instant situation to be somewhat unique within this State, and thus the effect of Ordinance 597 will not be far-reaching. Further, I do not believe the ultimate effect of Ordinance 597 would be to frustrate West Virginia's comprehensive statewide regulatory scheme, as happened in the *Stablex Corporation* case.

Finally, there can be no question but that the right of a landowner to use his land as he sees fit is a right which must be strenuously protected. However, what plaintiff seeks to do with this land (and what is prohibited by Ordinance 597) contravenes and, in my opinion, threatens the public welfare. Surely in a state as rural as West Virginia, a better site for disposal of hazardous waste can be found than one which is within the city limits, and virtually in the middle of, this State's seventh largest city (U.S. Census, 1980).

Counsel for the defendant is directed to prepare an Order reflecting this ruling, attaching thereto a copy of this letter opinion, and present same to opposing counsel for initialing and subsequent entry. The Order should provide for a stay of thirty (30) days to allow plaintiff an opportunity to appeal.

Very truly yours,

/s/ FRED L. FOX, II
Fred L. Fox, II

FLF,II:le
cc: Court file

APPENDIX D

ORDER OF THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF MARION COUNTY,
WEST VIRGINIA
DIVISION II

SHARON STEEL CORPORATION, Plaintiff, v. THE CITY OF FAIRMONT, WEST VIRGINIA, EDWIN C. DALEY, City Manager of Fairmont, West Virginia, and GEORGE R. HIGINBOTHAM, City Attorney of Fairmont, West Virginia, Defendants.	CIVIL ACTION No. 83-C-392

ORDER

Came plaintiff, by counsel, and defendants, by counsel, upon the parties' cross-motions for summary judgment as to the legal validity of City of Fairmont Ordinance 597 and upon defendants' motion to dissolve the temporary injunction heretofore awarded plaintiff against defendants on the 29th day of July, 1983. It appearing to the Court from the pleadings that there is no genuine issue of fact concerning the cross-motions for summary judgment as to the legal validity of Ordinance 597, and the parties having represented the same to the Court; and after hearing the arguments of counsel, the Court is of the opinion to and doth find the following facts and make the following conclusions of law:

1. Both case law and the specific language of the federal Resource, Conservation, and Recovery Act, 42 U.S.C. §6901 *et seq.*, indicate that the Fairmont ordinance and other similar state and local laws are not meant to be preempted by the federal legislation.

2. Ordinance 597 is not designed to regulate the disposal of hazardous waste. Rather, it was adopted to deal with a nuisance, and is within the purview of the plenary power granted municipalities by West Virginia Code §8-12-5.

3. West Virginia Code §2-5E-1 *et seq.*, does not restrict the rights of municipalities to deal with what they deem to be "nuisances".

4. Ordinance 597 is neither arbitrary nor unreasonable, under the circumstances; indeed, it bears a real and substantial relation to the public health, safety and general welfare.

5. There is no just reason for delay in entering judgment on the cross-motions as to the legal validity of Ordinance 597.

Accordingly, it is ORDERED that plaintiff's motion be and the same is hereby denied; that defendants' motion for summary judgment on Count 4 of their Counterclaim as to the legal validity of Ordinance 597 and motion to dissolve the temporary injunction be and the same are hereby granted, and that judgment hereon be entered, and the same is hereby entered, reserving unto plaintiff its objections and exceptions, and further staying the execution of this judgment and the dissolution of the injunction for a period of thirty (30) days from entry of this order in which time plaintiff may appeal.

It is further ORDERED that the Court's letter opinion of February 22, 1984 be made a part hereof by reference.

ENTER:

.....
JUDGE

APPENDIX E

NOTICES OF APPEAL

IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

SHARON STEEL CORPORATION, Appellant, v. THE CITY OF FAIRMONT, WEST VIRGINIA, EDWIN C. DALEY, City Manager of Fairmont, West Virginia, and GEORGE R. HIGINBOTHAM, City Attorney of Fairmont, West Virginia, Appellees.	No. 16349

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Sharon Steel Corporation, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of West Virginia entered herein on June 3, 1985 (rehearing denied July 10, 1985).

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ ROBERT W. THOMSON
HAYS WEBB
ALFRED J. LEMLEY

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Counsel for Appellant
Sharon Steel Corporation

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

DIVISION II

SHARON STEEL CORPORATION, Plaintiff, v. THE CITY OF FAIRMONT, WEST VIRGINIA, EDWIN C. DALEY, City Manager of Fairmont, West Virginia, and GEORGE R. HIGINBOTHAM, City Attorney of Fairmont, West Virginia, Defendants.	CIVIL ACTION No. 83-C-392

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Sharon Steel Corporation, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the June 3, 1985 order of the Supreme Court of Appeals of West Virginia (rehearing denied July 10, 1985) affirming the order of the Circuit Court of Marion County, West Virginia, Division II, entered herein on April 13, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ ROBERT W. THOMSON
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ALFRED J. LEMLEY

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Counsel for Plaintiff
Sharon Steel Corporation

APPENDIX F

LIST OF PARENTS, SUBSIDIARIES AND AFFILIATES PURSUANT TO SUPREME COURT RULE 28.1

Appellant Sharon Steel Corporation's stock is 86% owned by NVF Company.

Subsidiaries of Sharon Steel Corporation include Carpentertown Coal & Coke Co., Macomber, Inc., Sharon Building & Land Corp., Sharonsteel Products Co., Union Steel Corp., Summit Systems, Inc., Alaska Gold Co., Arava Exploration Co., Kennet Company Ltd., Mueller Brass Co., Itawamba Industrial Gas Co., Inc., Mueller Industrial Realty Co., Streamline Copper & Brass Ltd., United States Fuel Co., King Coal Co., Ussram Exploration Co., U.S.S. Lead Refinery, Inc., United States Smelting Refining & Mining Co., Utah Railway Co., Washington Mining Co. and White Knob Mining Co.

Subsidiaries of NVF Company, in addition to Sharon Steel Corporation, include NVF Industries of Canada, Ltd., NVF Europe, S.A., NVF Export Ltd., The Steel Corp. of Texas, APL Corp.

Affiliates of NVF Company include National Can Corp., Burnup & Sims Inc., Howell Industries, City Investing Co., Evans-Products Co., Johnson Controls, Inc., Insurance and Risk Management, Inc.

APPENDIX G

FAIRMONT ORDINANCE NO. 597

ORDINANCE NO. 597

AN ORDINANCE PROHIBITING PERMANENT DISPOSAL OF HAZARDOUS WASTE; PENALTIES; DECLARATION OF NUISANCE; NOT APPLICABLE TO STORAGE OF WASTE PRODUCTS OF BUSINESS OPERATIONS COMPLYING WITH STATE AND FEDERAL STANDARDS.

WHEREAS, West Virginia Code 8-12-5 given [sic] plenary power and authority for municipalities to control and administer waterfronts and waterways; to prohibit the accumulation and require the disposal of garbage, refuse, waste, ashes, trash and other similar matters; to prevent injury or annoyance to the public or individuals from anything dangerous, offensive or unwholesome; to project and promote the public morals, safety, health, welfare and good order; to provide for the elimination of hazards to public health and safety and to abate or cause to be abated anything which in the opinion of a majority of the governing body is a public nuisance; and

WHEREAS, the City Council finds that permanent disposal of hazardous wastes within the City is a nuisance in that it may depreciate property values; have an adverse impact on the City's ability to attract new business and industry and encourage expansion of existing business and industry; create a continuing serious anxiety and concern among city residents and visitors concerning the existence of a permanent hazardous waste disposal site within the city, all of which are offensive and constitute injury and annoyance to the public and individuals; and

WHEREAS, the City Council finds that prohibition of the permanent disposal of hazardous waste will protect and promote the public morals, safety, health, welfare and good order in the City;

NOW THEREFORE THE CITY OF FAIRMONT HEREBY ORDAINS THAT:

SECTION 1. *Definitions:* "Permanent Disposal" or "Permanently Dispose" means the discharge, deposit, injection, dumping, spilling, leaking or placement of any hazardous waste into, on, above, or below any land or water which waste is to remain or which has remained at a disposal site within the City for a continuous period of five years and which is not intended to be removed from such site.

"Hazardous Waste" means a waste or combination of wastes, which because of its quantity, concentration or physical, chemical or infectious characteristics, may cause, or significantly contribute to an increase in mortality, or an increase in serious irreversible, or incapacitating reversible illness, or pose a substantial present or potential hazard to human health or the environment when stored. Provided, however, that hazardous wastes shall include only those whose disposal would require a state or federal hazardous waste permit.

"Person" means any individual, trust, firm, joint stock company, public or private or governmental corporation, partnership, association, state or federal agency.

"Storage" means the otherwise local containment of hazardous wastes which wastes are not intended to be permanently disposed of at any site within the City.

"Waste" means any garbage, refuse, sludge, and other discarded material including solid, liquid, semi-solid, or contained gaseous material resulting from in-

dustrial, commercial mining and agricultural operations, but does not include solid or dissolved material in domestic sewage.

SECTION 2. *Prohibition:* It shall be unlawful for any person to permanently dispose or attempt to permanently dispose of hazardous waste within the City. Provided, however, that storage of hazardous wastes by duly licensed and taxpaying enterprises shall not be prohibited.

SECTION 3. *Nuisance:* In the event any person shall dispose or establish a site for the permanent disposal of hazardous waste in violation of the provisions of this Ordinance, the City Attorney is authorized, upon instructions from the City Manager, in addition to other penalties set forth herein, to institute any appropriate civil action or proceedings to prevent such disposal of hazardous waste, the same being deemed a public nuisance.

SECTION 4. *Penalties:* Any person who shall violate a provision of this Ordinance or fail to comply with any of the requirements hereof shall be guilty of a misdemeanor, punishable by a fine of not more than Five Hundred Dollars, or by imprisonment not exceeding thirty days, or both fine and imprisonment. Each day that a violation continues or has not been totally abated shall be deemed a separate offense.